No. 737

In the

Supreme Court of the United States

October Term, 1958

RALPH L. WRIGHT,

Petitioner,

vs.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, a Corporation,

Respondent.

REPLY BRIEF OF PETITIONER

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I.

THE CAUSAL RELATION BETWEEN RESPONDENT'S VIOLATION OF THE SAFETY APPLIANCE ACT AND PETITIONER'S INJURIES WAS NOT TOO REMOTE TO BE SUBMITTED TO THE JURY.

Respondent claims that because the first effort to secure the replacement part for the broken coupler from a passing train was unsuccessful and that because 7 or 8 additional minutes passed before petitioner was ordered to go into the nose of the diesel to obtain the replacement knuckle and was thus injured, the chain of causation was broken. Apparently respondent would say that if petitioner had been ordered to get the replacement knuckle from the nose of the diesel immediately upon the breaking of the coupler

(a violation of the Safety Appliance Act) then the violation would be considered a "proximate" cause of the injury, but since the unsuccessful effort and a few additional minutes came first, the violation which would have been a perfectly good legal cause now became so remote that the jury could not be allowed even to consider it. The emergency caused by respondent's violation of the Act, viz: the defective brakes and broken coupler, persisted, and it was the sole reason that petitioner was ordered into the nose of the diesel for the replacement part. Surely the fact that petitioner was so ordered a few minutes later rather than a few minutes sooner cannot change a legally efficient cause into a non-causal irrelevancy.

The cases cited by respondent simply state that there must be negligence or a violation of the Safety Appliance Act which causes an employe's injuries to make the railroad liable. With this principle we of course have no quarrel. Respondent, however fails to recognize that under the recent decisions of this Court, cited in the Petition, if the negligence or violation "played any part, even the slightest in producing the injury" *it is for the jury not an appellate court* to determine whether the causal relation is sufficient.

As pointed out in the Petition for Certiorari, the character of the injury was definitely foreseeable from the violation, even though such foreseeability is not required (p. 16 Pet. for cert.). Obviously if a knuckle in a coupler is going to break, a replacement part will have to be obtained; if such parts are stored in the nose of the diesel, someone will have to go into the nose of the diesel to get the replacement knuckle, and if the nose of the diesel is unsafe, it is surely not only foreseeable, but even probable that if a coupler knuckle breaks, the person, such as petitioner here, who is sent for the replacement part may

very well get hurt. The foreseeability of a broken air hose's being held the cause of the employe who is procuring the replacement part falling off a trestle while so doing as in *New York N. H. & H. R. Co.* v. *Leary*, 204 F. (2d) 461 (1953 Cal) (*Cert. Den. 346 U.S. 856, 98 L.* ed. 370, 74 S. Ct. 71 (1953), or the foreseeability of a broken coupler's being held the cause of the employee who is repairing the same being hit by switched cars while so engaged as in *St. L. & Southwestern R. Co.* v. *Ferguson*, 182 F. (2d) 949 (1950 Ca8), surely makes foreseeability in the case at bar follow *a fortiori*.

II.

THE JUDGMENT BELOW HAD THE REQUISITE FINALITY TO JUSTIFY REVIEW BY THIS COURT ON CERTIORARI.

When the Ohio Court of Appeals with finality reversed and set aside the verdict and judgment for petitioner, even though it remanded the case for a new trial, its judgment, unless reversed by this Court, with fatal, permanent finality forever deprived petitioner of his cause of action for injuries due to violations of the Safety Appliance Act.

The Ohio Appellate Court specifically ruled that petitioner could not base a claim on violations of the Safety Appliance Act, and its ruling rested solely on that ground. That cause of action was completely removed from the case and the remand for a new trial did not permit that cause of action to be retried under any circumstances. The judgment thus with irrevocable finality (subject now only to review and reversal by this Court) took away from petitioner his cause of action for injuries due to violations of the Safety Appliance Act.

Granted that this Court will ordinarily not consider as final a judgment which simply grants a new trial and remands for further proceedings where in such new trial all causes of action are preserved to the litigants, this Court, however, takes a different view where the State Appellate Court has by its decision, considering the opinion together with the formal judgment, effectively removed a cause of action from or added a cause of action to such further proceedings.

Thus in *Johnson* v. *Muelberger*, 340 U.S. 581, 95 L.ed. 553, 71 S. Ct. 474 (1951), although the New York Appellate Court had reversed and remanded the case for further proceedings, since its decision had effectively subjected the petitioner to a cause of action on such remand, based on an erroneous view of the full faith and credit clause, this court held that the New York Appellate Court's decision was a *final* judgment, granted certiorari and reversed.

In *Pope* v. *Atlantic Coastline R. Co.*, 345 U.S. 379, 97 L.ed. 1094, 73 S. Ct. 749 (1953), the action of the Georgia Appellate Court in overruling a demurrer and remanding for further proceedings was nevertheless held a *final* judgment, as it effectively deprived petitioner of rights under F.E.L.A. Certiorari was granted and the Georgia Court reversed.

In none of the cases cited by respondent where this Court refused certiorari, had the plaintiff recovered a money judgment which was set aside or had the plaintiff been deprived of a cause of action.

In *Gospel Army* v. *City of Los Angeles, Calif.*, 331 U.S. 543, 91 L.ed. 1662, 67 S. Ct. 1428 (1947), this Court specifically stated that the California Appellate judgment under attack authorized plaintiff on the retrial to make and try to prove every point it claimed. There was plainly no deprivation of any cause of action by the state court decision.

In *Market St. Ry.* v. *R. R. Comm. of Calif.*, 324 U.S. 548, 89 L.ed. 1171, 65 S. Ct. 770 (1945), rehearing den. 324 U.S. 890, 89 L.ed. 1438, 65 S. Ct. 1020 (1945), the time at which a judgment became final was the point involved, not the character of the judgment.

In *South Pac. Co.* v. *Gileo et al.*, 351 U.S. 493, 100 L.ed. 1357 76 S. Ct. 952 (1956), there were five cases. In only *two* of the five cases was it held that certiorari should not have been granted for lack of finality of the judgment below, and in those *two* cases there *never had been any trial at all.* Significantly, in the other three cases where, in two of which the plaintiffs had recovered money judgments and in one non-suited, this Court did grant certiorari and on the merits sustained the plaintiff's position.

Since the Court of Appeals of Ohio by its judgment finally and irrevocably deprived petitioner of his cause of action for violations of the Safety Appliance Act, that judgment is sufficiently final to authorize this Court to grant Certiorari to review it.

III.

THE DECISION BELOW WAS NOT BASED ON ANY NON-FEDERAL GROUNDS, BUT WAS BASED SOLELY ON THE FEDERAL GROUNDS SET FORTH IN THE PETITION FOR CERTIORARI.

The Opinion of the Court of Appeals of Ohio speaks for itself. It is quoted verbatim beginning at p. 1a of the Petition for Certiorari. It shows that although respondent asserted six grounds of error, five of which were non-federal and one of which was federal, it specifically held all the non-federal assignments of error to be without merit and reversed solely on the applicability of Federal Safety Appliance Ace. The only question asserted, or argued on the

motion to certify to the Supreme Court of Ohio was this federal question.

No interpretation of motivation can be given the action of the Supreme Court of Ohio in overruling Petitioner's Motion to Certify. In overruling a motion to certify, the Ohio Supreme Court makes no decisions on any point raised, and no inferences can be drawn as to its views on any of them. *Swetland* v. *Evatt, Tax Com'r.*, 139 O.S. 6, 37 N.E.(2d) 601 (1941); *Hurless* v. *State*, 75 O.L. abs. 70 (1956). It simply declines to accept the case for review. Its decision is not a judgment, and for that reason the Writ of Certiorari from this Court, if one is granted in this case, should be directed to the Court of Appeals of Hamilton County, Ohio, and not to the Supreme Court of Ohio. *Western Union Telegraph Company* v. *Priester*, (1928) 276 U.S. 252, 72 L.ed. 555, 48 S. Ct. 234; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, Comptroller of Public Accounts, et al.*, (1954) 347 U.S. 159, 98 L.ed. 583, 74 S. Ct. 396.

The cases cited by respondent give no support to Respondent. Indeed in *Block* v. *Block*, 350 U.S. 808, 100 L.ed. 725, 76 S. Ct. 74, (1955) this Court did grant Certiorari and actually vacated the judgment of the Ohio Supreme Court on the federal ground involved, leaving it up to the State Court to clarify whether its decision rested on state or federal grounds. Respondent's point IV in its Brief make it plain that it recognizes that no non-federal questions were involved in the judgment below.

IV.

RESPONDENT'S REQUEST FOR PERMISSION TO ASSERT NON-FEDERAL GROUNDS TO THE SUPREME COURT OF OHIO AGAINST PETITIONER'S VERDICT IS PREMATURE.

As stated above, the Ohio Court of Appeals decided all non-federal points asserted by respondent against respondent. Respondent has requested that if this Court decides the federal questions sought to be reviewed here in favor of petitioner, then this Court should permit respondent to present to the Supreme Court of Ohio the non-federal grounds on which in the Court of Appeals it attacked petitioner's verdict, and on which the latter court decided against respondent. We submit that that request is premature at this time and would more properly be made on the merits.

This Court has plenary power on the merits, should it grant certiorari and decide the federal questions in favor of petitioner, to pass on the matters of state law desired to be raised by respondent as well, in order to dispose of the whole case without the necessity of still further proceedings in the state courts. At that time this Court can determine whether it wishes to decide itself the state law questions then sought to be raised by respondent, or to give respondent the opportunity to try to persuade the Supreme Court of Ohio to grant a motion to certify by respondent, or to consider respondent's claims on the state law questions already decided against respondent by the Court of Appeals, unworthy of further consideration.

PRAYER

For the foregoing reasons, together with those set forth in the Petition for a Writ of Certiorari, petitioner prays that a Writ of Certiorari issue directed to the Court of Appeals of Hamilton County, First Appellate District of Ohio, in this case, to the end that the judgment of that Court may be reviewed by this Court and reversed with directions that the judgment of the trial court should be affirmed.

Respectfully submitted.

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